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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1865

BERNARD OSTRAGER,
Appellant,

vs.

STATE BOARD OF CONTROL, et al.,
Appellees.

On Appeal from the Court of Appeal of the State of California, First Appellate District, Division Four

JURISDICTIONAL STATEMENT

MICHAEL TRAYNOR
COOLEY, GODWARD, CASTRO,
HUDDLESON & TATUM
One Maritime Plaza, Suite 2000
San Francisco, California 94111
Telephone: (415) 981-5252

MARGARET C. CROSBY
ALAN L. SCHLOSSER
AMITAI SCHWARTZ
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.
814 Mission Street
San Francisco, California 94103
Telephone: (415) 777-4880
Counsel for Appellant

May 21, 1980

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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JURISDICTIONAL STATEMENT

The Appellant, Bernard Ostrager, a resident of New York, appeals from a decision of the Court of Appeal of the State of California (First Appellate District, Division Four), which affirmed the judgment of the trial court in favor of Appellees.* A petition for hearing was denied by the Supreme Court of California. Appellant submits that the Supreme Court of the United States has jurisdiction of this appeal and that the appeal presents substantial constitutional questions.

OPINION BELOW

The opinion of the Court of Appeal, which is reprinted in the appendix (p. A-1, *infra*) is reported at 99 Cal.App.3d

*The Appellees are the State Board of Control and the individual members thereof in their official capacities.

1, 160 Cal.Rptr. 317 (1979). The order of the Supreme Court of California denying a hearing, which is reprinted in the appendix (p. B-1, *infra*), is reported in the advance sheets for 26 Cal.3d (Cal. Official Reports No. 8, Mar. 18, 1980, Minutes, p. 5).

JURISDICTION

On November 29, 1979, the Court of Appeal filed its judgment. On February 27, 1980, the Supreme Court of California denied appellant's petition for hearing. On May 16, 1980, appellant, in the Court of Appeal, filed his notice of appeal to this Court. (App. p. C-1, *infra.*) This Court has jurisdiction to hear the appeal under 28 U.S.C. § 1257(2).

CALIFORNIA STATUTE IN ISSUE

The Victims of Crime Act, Cal. Gov. Code §§ 13959-969.1 (summarized, *infra,* at 5-7), provides in section 13961(a) as follows:

> "A victim of a crime of violence may file an application for assistance with the board provided that the victim was a resident of California at the time the crime was committed and either:
>
> "(1) The crime was commited in California; or
>
> "(2) The person whose injury or death gave rise to the application was a resident of California who was injured or killed while temporarily outside the state."

QUESTIONS PRESENTED

1. Under the Privileges and Immunities Clause of Article IV of the Constitution of the United States, may victims of violent crime in California be excluded from assistance under the state's victims of crime act solely on the ground that they are nonresidents?

2. Is the state's discrimination against victims of violent crime, solely on the basis of their nonresidence, also repugnant to the Equal Protection Clause, the Commerce Clause, and the Privileges or Immunities Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

A. Summary of the Facts

The facts are brief and stipulated. (CT 145-151.)[1] On November 23, 1976, Bernard Ostrager (appellant), a citizen of the State of New York, was shot in the left leg by a person unknown to him, while he was on vacation in San Francisco, California. (CT 146.) He was immediately hospitalized at Saint Francis Memorial Hospital, where he received surgical and medical treatment. (CT 146.)

A San Francisco police officer investigated the sniping, spoke with appellant at the hospital, and gave him instructions for applying as a crime victim for financial assistance in California because of his gunshot injuries. (CT 147; CT 140, 142.) Appellant subsequently returned to his home in New York City, where he is employed as a taxi driver. (CT 146.)

Appellant filed a timely application for assistance with appellee State Board of Control, which administers California's Victims of Crime Act. (CT 147, 149-150.) The Board refused to consider appellant's claim solely on the ground that he was a resident of New York and therefore ineligible for assistance. (CT 147-148.) It stated that

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[1]CT references are to the Clerk's Transcript which constituted the record on appeal below.

"[t]here is no provision for acceptance of an application from a nonresident applicant or victim." (CT 151.)[2]

B. Raising of the Federal Questions and Summary of Proceedings in the Courts Below.

After the Board rejected his application, appellant filed a timely petition for writ of mandate and complaint for declaratory and other relief in the Superior Court for the City and County of San Francisco. (CT 1-13.) The trial court heard the matter on the stipulated facts (CT 145-151), briefs (CT 14-45; CT 54-88; CT 98-124; CT 125-137), and oral argument. Appellant raised the federal questions in his petition and complaint and briefs in the trial court. (CT 1-13), CT 14-45, CT 98-124.) On May 16, 1978, the trial court entered judgment for the Board, denying a peremptory writ of mandate and dismissing the complaint. (CT 156.)

Appellant reiterated the federal questions in his briefs in the Court of Appeal. That court affirmed the judgment of the trial court. It relied on the hunting license case of *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371 (1978), to reject appellant's claim under the Privileges and Immunities Clause. In its view, "neither noncommercial elk hunting nor receiving compensation as a crime victim from the state in which the crime occurred is a basic right." 99 Cal.App.3d at 6.

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[2] In contrast to the California statute, the New York statute provides compensation for victims of crime in New York, regardless of residence; and it defines "victim" simply and inclusively as "a person who suffers personal physical injury as a result of a crime." N.Y. Exec. Law (McKinney) § 621. Appellant does not appear to be eligible for compensation under the New York statute because it applies only to victims of crimes that occur in New York. *Id.*

The Court of Appeal thus failed to meet the tests demanded by *Hicklin v. Orbeck,* 437 U.S. 518 (1978), and *Toomer v. Witsell,* 334 U.S. 385 (1948), namely: "Was there a substantial reason for the discrimination? Is there something to indicate that noncitizens constitute a peculiar source of the evil at which the discriminating statute is aimed? Is there a reasonable relationship between the danger presented by noncitizens and the discrimination practiced upon them?" 99 Cal.App.3d at 6.

The Court of Appeal also rejected appellant's claim under the Equal Protection Clause, on the grounds that "strict scrutiny" was "unnecessary and inappropriate" and that the residency requirement was "rationally related to the state's legitimate objective of cost savings." *Id.* at 7. It likewise rejected appellant's other constitutional arguments. *Id.* at 8.

Appellant reiterated the federal questions in his petition for hearing to the Supreme Court of California. That court denied appellant's petition; hence this appeal.

C. The California Victims of Crime Act

1. The act declares the public interest in assisting resident victims of crime, Cal. Gov. Code § 13959.[3] It defines a victim as "a person who sustains physical injury or death as a direct result of a crime of violence," or as a dependent or person who pays or assumes the medical or burial expenses incurred as a result of a death. § 13960(a).

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[3]All statutory references are to the Government Code of California unless otherwise specified.

2. A victim may file an application for assistance with the State Board of Control provided he meets the residency test. § 13961(a). After the application for assistance is reviewed and verified, § 13962, the State Board of Control holds a hearing, § 13963, and approves the application if the applicant is eligible for assistance. § 13964.

3. Assistance may include cash payments for pecuniary loss attributable to medical or medical-related expenses up to $10,000, loss of wages or support up to $10,000, job retraining or similar rehabilitative services up to $3,000, and attorneys' fees up to 10% of the award or $500, whichever is less. § 13965. The State is subrogated to the victim's rights. § 13966.

4. The statute does not define the term "resident of California at the time the crime was committed." California Government Code section 244, however, sets forth rules for determining the place of residence and the State Board of Control has adopted a regulation, 2 Calif. Admin. Code § 649.12, defining the term "resident of California" for purposes of the Victims of Crime Act. (These provisions are quoted in the Court of Appeal's decision, 99 Cal.App.3d at 3 n. 1.)

Appellant was not, nor does he claim that while he was visiting California he was a "resident" under either of the foregoing provisions.

5. The state budget provides an appropriation for the payment of claims, § 13969, funded by tax revenues and an "Indemnity Fund" created by fines of up to $10,000 imposed on defendants convicted of crimes of violence. § 13967.

For the fiscal year 1976-77, when appellant suffered criminal attack, California paid to victims of crime approximately $5,614,865, about 1/2000 of the total general fund expenditures.[4]

Nonresidents contribute to the tax revenues that fund the Victims of Crime Act. California imposes a personal income tax on "the entire taxable income of every nonresident which is derived from sources within this state." Cal. Rev. & Tax. Code § 17041(a). In the income year 1976, nonresidents filed 110,900 personal income tax returns with the Franchise Tax Board of the State of California and were assessed a total of $16,934,000 in California personal income tax. See Cal. Franchise Tax Board, 1976 Ann. Rep. 84, 100.

Nonresidents also pay sales tax collected by retailers on nonexempt retail sales made in California, Cal. Rev. & Tax. Code §§ 6051, 6052, 6247, 6386-87; as well as inheritance tax and gift tax on taxable transfers of real property located in California. Cal. Rev. & Tax. Code §§ 13303, 13401, 13851, 14653, 15103, 15201, 15451. Moreover, nonresident tourists pay other taxes such as gasoline taxes directly or indirectly incident to their visits.

6. Correspondingly, the Indemnity Fund is in some measure dependent upon fines up to $10,000 levied against criminals whose victims are nonresidents. § 13967.

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[4] Report of the Legislative Analyst to the Joint Legislative Budget Committee, Analysis of the Budget Bill of the State of California for the Fiscal Year July 1, 1977 to June 30, 1978, p. 1015, and p. A-2 (total general fund expenditures of $10,889,681,293 for 1976-77); and the comparable Report for the Fiscal Year July 1, 1976 to June 30, 1977, pp. 65-66.

THE QUESTIONS ARE SUBSTANTIAL

1. The California residency test is repugnant to the Privileges and Immunities Clause

The United States Constitution, Article IV, Section 2 provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The Privileges and Immunities Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell,* 334 U.S. 385, 395 (1948). It inhibits a state from discriminating against nonresidents. *Paul v. Virginia,* 75 U.S. (8 Wall.) 168, 180 (1869). Unless the state can show that nonresidents constitute "a peculiar source of the evil at which the statute is aimed" and that the discrimination bears a "substantial relationship" to such evil, the statute is repugnant to the Privileges and Immunities Clause. *Hicklin v. Orbeck,* 437 U.S. 518, 526-27 (1978) (invalidating the "Alaska Hire" statute that gave a blanket employment preference to residents).

The Privileges and Immunities Clause reflects the principle of "mutual friendship" in Article IV of the Articles of Confederation. It "may be esteemed the basis of the Union." The Federalist No. 80 (A. Hamilton). It fosters interstate harmony and protects nonresidents who are not represented in the state's legislative halls. *Austin v. New Hampshire,* 420 U.S. 656, 660-61, 662 (1975). The protections of the Clause are not circumscribed as they once were by "natural rights" theory, *Corfield v. Coryell,* 6 Fed. Cas.

546 (No. 3230) (C.C.E.D. Pa. 1823). That theory, discarded by *Paul v. Virginia,* 75 U.S. (8 Wall.) 168 (1869), and dismissed as the product of a bygone era in *Hague v. C.I.O.,* 307 U.S. 496, 511 (1938), was "replaced by the view that the measure of the rights secured to nonresidents was the extent of the rights afforded by a State to its own citizens." *Baldwin v. Montana Fish & Game Comm'n,* 436 U.S. 371, 397 (1978) (dissenting opinion); see *Hicklin v. Orbeck,* 437 U.S. 518 (1978).

The Court has invoked the Privileges and Immunities Clause many times to strike down discrimination against nonresidents in such areas as taxation, abortion, license fees, access to courts, contract rights and creditors' preferences.[5] The instant case affords the Court its first oppor-

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[5]See *Austin v. New Hampshire,* 420 U.S. 656 (1975) (invalidating New Hampshire "Commuters Income Tax" on nonresidents); *Doe v. Bolton,* 410 U.S. 179 (1973) (invalidating statutory prohibition against nonresidents obtaining abortions in state; less restrictive alternatives available); *Mullaney v. Anderson,* 342 U.S. 415 (1952) (invalidating discriminatory license fee for commercial fishermen in territorial waters); *McKnett v. St. Louis & S.F. Ry. Co.,* 292 U.S. 230, 233 (1934) (invalidating restriction on nonresident access to state courts); *Travis v. Yale & Towne Mfg. Co.,* 252 U.S. 60, 79-82 (1920) (invalidating preferential exemption treatment for residents); *Chalker v. Birmingham & N.W. Ry.,* 249 U.S. 522 (1919) (invalidating license tax that discriminated against nonresident contractors); *Blake v. McClung,* 172 U.S. 239 (1898) (invalidating statutory preference for creditors resident in Tennessee); *Ward v. Maryland,* 79 U.S. (12 Wall.) 418, 424 (1871) (invalidating special tax on nonresidents for privilege of selling goods produced in other states).

For state court cases, see *Salla v. County of Monroe,* 48 N.Y.2d 514, 399 N.E.2d 909, 423 N.Y.S.2d 878 (1979) *cert. denied* . . . U.S. . . . , 48 LW 3676 (No. 79-1335) (1980) (invalidating statutory preference for New York residents on public works projects); *In the Matter of Gordon,* 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979) (invalidating state bar durational residency requirement); *Borden v. Selden,* 259 Iowa 808, 146 N.W. 2d 306, 312-14 (1966) (invalidating tax statute that discriminated against non-

tunity to address the issue of discrimination against nonresidents under a state compensatory statute and to guard against any impairment of the Privileges and Immunities Clause via pleas in the name of "cost savings" or "administrative convenience" that are in any event hypothetical.[6] Such pleas shrivel before a clause that explictly encompasses *all* privileges and immunities, thus positing a rule that yields "only in an extreme case" in much the same way as "the seemingly unyielding prohibition of the first amendment." Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. Pa. L. Rev. 379, 388 (1979). Moreover, "when the benefits of a law are potentially available to the population of the state in general, and when extension of its benefits to

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residents); *State v. Nolfi*, 141 N.J. Super. 528, 358 A.2d 853, 858-59 (1976) (invalidating exclusion of criminal defendant, a resident of New York City, from pretrial intervention program in Hudson County, New Jersey); *Quong Ham Wah Co. v. Industrial Accident Comm'n*, 184 Cal. 26, 38, 41, 192 Pac. 1021 (1920) *writ of error dismissed*, 255 U.S. 445 (1921) (extending workmen's compensation statute to certain claims by nonresidents); *Estate of Johnson*, 139 Cal. 532, 73 Pac. 424 (1903) (extending exemption under state inheritance tax to nonresidents).

[6]Noncompensatory programs also cost money and involve administrative inconvenience. For example, had appellant asked the San Francisco police to investigate the crime and been refused on the ground that he was a citizen of New York, the refusal unquestionably would have been unconstitutional. No contention that California could conserve financial resources or avoid administrative inconvenience by denying police protection to visitors would be sustained. Moreover, had appellant filed a civil action against the sniper in a California court and been told that California tort remedies are only available for residents, he would unquestionably obtain relief under the Privileges and Immunities Clause. *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233 (1934). No contention that California can improve its budget or improve administrative convenience by denying judicial remedies to nonresident victims would be upheld. See also *Doe v. Bolton*, 410 U.S. 179, 200 (1973) (no intimation Georgia medical facilities were "utilized to capacity in caring for Georgia residents").

citizens of other states would advance the mutual interests of all states by avoiding the cycle of retaliation and reciprocity, the Constitution requires such extension." Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities,* 69 Yale L.J. 1323, 1391 (1960).

Nonresidents do not visit California to become victims of violent crime to qualify for the limited assistance available under the statute. Victims of crime, unlike elk hunters, *e.g. Baldwin v. Fish & Game Comm'n.,* 436 U.S. 371 (1978),[7] or students seeking preferential tuition rates, *e.g., Kirk v. Board of Regents,* 273 Cal.App.2d 430 (1969), *appeal dismissed,* 396 U.S. 554 (1970), have no control over the circumstance that makes the state program applicable, namely, a violent crime.

The *Hicklin* and *Toomer* tests, demanding a "substantial reason" for the discrimination and a "substantial relationship" to the "peculiar source of the evil" purportedly represented by nonresidents, are incompatible with the routine of categorizing rights that was resurrected temporarily in *Baldwin.* The Court of Appeal's purported "synthesis" is illusory; and, if allowed to stand, it will encourage further impairment of the Privileges and Immunities Clause via discrimination based on "state attachments, state prejudices, state jealousies, and state interests" that this Court is empowered to guard against. *Martin v. Hunter's Lessee,*

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[7]It bears noting also that *Baldwin's* reliance on the state's special interest in controlling wildlife resources, *e.g.,* its citation to *Geer v. Connecticut,* 161 U.S. 519 (1896) is inapplicable to a program of monetary assistance to victims of violent crime, and that the *Geer* case was recently overruled in *Hughes v. Oklahoma,* 441 U.S. 322 (1979).

14 U.S. (1 Wheat.) 304, 347 (1816). By taking jurisdiction, this Court can determine unequivocally that the *Hicklin-Toomer* tests are not rendered inoperative by some arbitrary classification of a privilege or immunity as less than "basic" or "fundamental."

The California statute fails the *Hicklin-Toomer* tests and discriminates against nonresidents irrationally, arbitrarily, and unconstitutionally:

(a) No reason is set forth for the residency requirement in either the statute or any legislative history. A residency requirement per se "makes no sense." Edelhertz & Geis, *Public Compensation to Victims of Crime* 268 (1974).

(b) The exclusion of a crime victim solely because of his nonresidency adds injury to injury for no good reason. Consider the following examples:

(i) A, a former resident of Vermont, enters California with the intention of becoming a resident. Five minutes after becoming a California resident, he is shot by a sniper. Discouraged by the violence, A changes his mind, returns immediately to Vermont, and resumes residency there. A may receive compensation. The state candidly acknowledged in the trial court that:

> "If someone crossed the border into California with the requisite intent to remain indefinitely and to make California his home and if he was immediately victimized, he would satisfy the residency requirement." (CT 64, lines 7-11.)

(ii) B, a New York citizen, is temporarily assigned to her employer's California branch. While temporarily in California, B is shot by a sniper. B pays income taxes to

California on the income she earns here. The sniper is convicted and is fined $10,000 which is paid to the Indemnity Fund. B is not eligible for compensation.

(c) There is no showing that nonresidents constitute a peculiar source of the supposed costs and administrative inconvenience. Indeed, the claims of nonresident victims in California are likely to cause far less cost and inconvenience than the claims of many resident victims who are assured compensation for criminal violence outside of California.

(d) The residency test cannot be justified as a legitimate restriction of funds for needy Californians. Had petitioner been a resident of California when he was shot and moved to New York the next day, he would have been eligible for compensation. The residency test cannot even be justified as an administrative convenience for budgeting purposes. The state of residence of all crime victims is not an easily obtainable or a regularly kept statistic and is not a rational budgeting mechanism. Indeed, the statutory coverage of California residents even for injuries out of state introduces such uncertainty for planning purposes that no administrative convenience or budgetary contention is tenable.

(e) The statute relates directly to the capacity of the victim to earn a livelihood. It authorizes compensation for specific purposes: medical or medical related expenses; loss of wages or support; and job retraining or similar employment-oriented rehabilitative services. § 13965. Such compensation, though it may not make the victim whole, at least ameliorates his injury. It is hardly rational to

equate a nonresident victim of gunshot with a nonresident hunter who merely pays a premium for wielding a gun.

(f) The residency test causes "total deprivation" rather than merely "delay" and hence is far harsher than a durational residency requirement of one year to obtain a divorce, as in *Sosna v. Iowa*, 419 U.S. 393, 410 (1975), or to obtain preferential tuition rates, as in *Kirk v. Board of Regents, supra.*

In brief, the time for a "fresh look at the clause is long overdue." Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. Pa. L. Rev. 379, 401 (1979).

2. The California residency test also is repugnant to the Equal Protection Clause, the Commerce Clause, and the Privileges or Immunities Clause of the Fourteenth Amendment

Although the Court has decided a number of durational residency cases, it has deliberately left open the issue of nondurational residency requirements under statutes such as the one in the instant case. *See Shapiro v. Thompson*, 394 U.S. 618, 638 n.21 (1969); *Austin v. New Hampshire*, 420 U.S. 656, 668 (1975).

The reasons for strict scrutiny of discrimination based solely on nonresidency go beyond the text of the Privileges and Immunities Clause. Nonresidents are not represented in the discriminatory state's legislature. *Austin v. New Hampshire, supra*, 420 U.S. at 662. Preventing arbitrary discrimination against them in one state prevents retaliation by other states and helps maintain "the structural

balance essential to the concept of federalism." *Id.* Discrimination based on nonresidency alone almost always is based on a fortuitous circumstance that rarely if ever results in a close fit of statutory purpose and classification. See, *Craig v. Boren,* 429 U.S. 190, 197, 201, 202 (1976). The so-called cost and convenience contentions advanced by the state are "after-the-fact rationalizations." The State cannot demonstrate that the residency test was adopted with such reasons in mind. *See Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 653 (1974) (concurring opinion of Powell, J.); *Vlandis v. Kline,* 412 U.S. 441, 449 (1973); *Hampton v. Mow Sun Wong,* 426 U.S. 88, 115 (1976). The state's discrimination raises substantial questions of equal protection;[8] interstate commerce;[9] the

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[8]See *Takahashi v. Fish & Game Comm'n,* 334 U.S. 410 (1948) (invalidating denial of fishing license to alien; companion case to *Toomer v. Witsell, supra*); *Sugarman v. Dougall,* 413 U.S. 634 (1973) (invalidating U.S. citizenship requirement); *In re Griffiths,* 413 U.S. 717 (1973) (similar); *Hanson v. Unified Sch. Dist.,* 364 F. Supp. 330 (D. Kan.) (1973) (invalidating nondurational residence requirement for teachers); *Kramer v. Union Free School Dist.,* 395 U.S. 621 (1969) (invalidating property or parenthood eligibility requirement for voting in school district election); Goldberg, *Equality and Governmental Action,* 39 N.Y.U.L. Rev. 205, 224 (1964) (re denial of the protection of the laws to victims of crime). See also the following cases invalidating durational residency requirements: *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974) (free nonemergency medical care for indigents); *Dunn v. Blumstein,* 405 U.S. 330 (1972) (voting); *Shapiro v. Thompson,* 394 U.S. 618 (1969).

Cf. *United States v. Carolene Products Co.,* 304 U.S. 144, 152-153 n.4 (1938) ("more searching judicial inquiry" into "prejudice against discrete and insular minorities").

[9]U.S. Const., Art. I, § 8; *Edwards v. California,* 314 U.S. 160 (1941); *Hicklin v. Orbeck,* 437 U.S. 518, 532-534 (1978); *In the Matter of Gordon,* 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979). The Court has under consideration the Commerce Clause case of *Reeves, Inc. v. State,* (Docket No. 79-677) that involves South Dakota's preference for residents in the disposition of its cement resources.

privileges or immunities of national citizenship under the Fourteenth Amendment,[10] and the right of travel;[11] Comparable substantial issues also arise under the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983.[12]

CONCLUSION

The Constitution of the United States was "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. Seelig,* 294 U.S. 511, 523 (1935). The Privileges and Immunities Clause embodies a spirit of neighborliness, a "norm of comity." *Austin v. New Hampshire,* 420 U.S. 656, 660 (1975). It should not be vitiated by arbitrary discrimination or by a residency requirement that "makes no sense." Edelhertz & Geis, Public Compensation to Victims of Crime 268 (1974). The instant case affords this Court a timely opportunity to reverse a spuriously reasoned de-

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[10]See *Edwards v. California* (1941) 314 U.S. 160, 177, 181 (concurring opinion); Tribe, *American Constitutional Law* 426 (1978).

[11]See *Shapiro v. Thompson,* 394 U.S. 618, 632, 628 n.21 (1969); *United States v. Guest,* 383 U.S. 745, 757 (1966); *Edwards v. California, supra; Dunn v. Blumstein,* 405 U.S. 330 (1972); *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974); *Fisher v. Reiser,* 610 F.2d 629, 637 (9th Cir. 1979) (dissenting opinion). Compare *McCarthy v. Philadelphia Civil Serv. Comm'n,* 424 U.S. 645 (1976) (upholding *municipal* ordinance requiring that fire fighters be city residents).

[12]In the courts below, the state raised an immunity defense to the section 1983 claim. However, this action was commenced in a state court and sought mandatory and declaratory relief against a state agency and officials, not damages. See *Williams v. Horvath,* 16 Cal. 3d 834, 548 P.2d 1125, 129 Cal.Rptr. 453 (1976) (state court jurisdiction); *cf. Scheuer v. Rhodes,* 416 U.S. 232 (1974); *Owen v. City of Independence,* U.S. , 48 LW 4389 (1980); Compare *Quern v. Jordan* (1979) 440 U.S. 332 (re possible limited liability of state in a *federal* court action, because of the Eleventh Amendment restriction on the judicial power of the United States).

cision, prevent a mischievous precedent, and reinforce the tests of *Hicklin v. Orbeck,* 437 U.S. 518 (1978).

In this context, it would be constructive for this Court to note probable jurisdiction and to reverse the judgment below.

Dated: May 21, 1980

Respectfully submitted,

MICHAEL TRAYNOR
COOLEY, GODWARD, CASTRO,
HUDDLESON & TATUM

MARGARET C. CROSBY
ALAN L. SCHLOSSER
AMITAI SCHWARTZ
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN
CALIFORNIA, INC.
Counsel for Appellant

(Appendix follows)

APPENDIX

Appendix

In the Court of Appeal of the State of California
First Appellate District—Division Four

1 Civil 45277

(Sup. Ct. No. 734773)

BERNARD OSTRAGER,
Plaintiff and Appellant,

vs.

STATE BOARD OF CONTROL, and the individual members thereof, KENNETH CORY, RUTH CHURCH GUPTA, DAVID JANSSEN, in their official capacities as members of the State Board of Control,
Defendants and Respondents.

Certified for Publication

Filed Nov. 29, 1979

OPINION

This action challenges the residency requirement of the California Victims of Crime statute, Government Code sections 13959-13969.1.

While vacationing in San Francisco, appellant, a citizen of the State of New York, was shot in the leg by a person unknown to him. He was hospitalized for surgical and medical treatment in San Francisco and then returned to his home. He filed an application for assistance with the

respondent board which administers California's Victims of Crime statute. Respondent refused to accept that application because appellant was not a resident of California at the time the crime was committed.

After his application was rejected, appellant petitioned for writ of mandate, declaratory and other relief, seeking both a determination that the residency limitation in the Victims of Crime statute is unconstitutional and an order directing respondent to entertain his application. An alternative writ issued. Respondents demurred generally to the petition. The trial court sustained the demurrer without leave to amend. This appeal is from the judgment that followed.

THE CALIFORNIA VICTIMS OF CRIME ACT

The California Victims of Crime Act begins by declaring that: "It is in the public interest to indemnify and assist in the rehabilitation of those residents of the State of California who as the direct result of a crime suffer a pecuniary loss." (Gov. Code, § 13959.)[1] A victim may

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[1]The statute does not define the term "resident of California at the time the crime was committed." However, Government Code section 244 sets forth rules for determining the place of residence. In relevant part, section 244 provides: "(a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose. [¶] (b) There can only be one residence. [¶] (c) A residence cannot be lost until another is gained. . . . [¶] (f) The residence can be changed only by the union of act and intent. . . ."

The State Board of Control has adopted a regulation, 2 California Administrative Code section 649.12, defining the term "resident of California" for purposes of the Victims of Crime statute. That regulation provides "Resident of California, for purposes of this article, means a citizen of this state as defined in Government Code Section 241, or an alien residing in California who is in possession of a document issued by the United States Immigration and

apply for assistance with the State Board of Control if he or she "was a resident of California at the time the crime was committed and either: [¶] (1) The crime was committed in California; or [¶] (2) The person whose injury or death gave rise to the application was a resident of California who was injured or killed while temporarily outside the state." (Gov. Code, § 13961, subd. (a).)

Appellant does not claim that while he was visiting California he was a "resident" under either of the foregoing provisions. Instead, he challenges the constitutionality of the residency requirement.

I. *Privileges and Immunities Clause of Article IV.*

Appellant's principal challenge is made under the Privileges and Immunities Clause of Article IV of the United States Constitution, the contours of which the Supreme Court itself admits have not been "precisely shaped by the process and wear of constant litigation and judicial interpretation over the years since 1789." (*Baldwin v. Montana Fish and Game Comm'n* (1978) 436 U.S. 371, 379.) Two very recent decisions of the United States Supreme Court, *Baldwin* v. *Montana Fish and Game Comm'n, supra,* and *Hicklin* v. *Orbeck* (1978) 437 U.S. 518, decided within a month of each other, offer clear guidance in this area.

In *Baldwin,* Montana's elk-hunting license statutes, under which nonresident elk hunters were charged 25 times as

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Naturalization Service which authorizes such person to reside in this state."

Government Code section 241, referred to in the regulation, provides that: "The citizens of the State are: [¶] (a) All persons born in the State and residing within it, except the children of transient aliens and of alien public ministers and consuls. [¶] (b) All persons born out of the State who are citizens of the United States and residing within the State."

much as the residents, were held not to violate the Privileges and Immunities Clause. Mr. Justice Blackmun's majority opinion traces the history of the clause, reviews the cases interpreting it and in so doing emphasizes the rationale of *Corfield* v. *Coryell,* 6 F. Cas. 546, 552 (No. 3,230 (CCED Pa. 1825)):

> "In his opinion in *Coryell,* Mr. Justice Washington . . . included in his list of situations, in which he believed the States would be obligated to treat each other's residents equally, *only those where a nonresident sought to engage in an essential activity or exercise a basic right.*" (Emphasis added.)

The court then uses the *Corfield* analysis in deciding that the distinction between residents and nonresidents made by Montana in establishing access to elk hunting does not "threaten a basic right in a way that offends the Privileges and Immunities Clause." (*Id.*, at p. 388.)

We find by identical reasoning that the Privileges and Immunities Clause is not violated by requiring applicants for compensation under the California Victims of Crime statute to be Californians. Nor do we understand appellant to challenge the conclusion that if the *Corfield* analysis applies, the Privileges and Immunities Clause is not violated. Rather, appellant contends that we should view the *Baldwin* decision as "an aberration" and instead should apply the rationale of *Hicklin v. Orbeck, supra,* decided one month after *Baldwin.* There the high court applied the Privileges and Immunities Clause to invalidate the "Alaska Hire" law which required that Alaskans be hired in preference to nonresidents for oil and gas pipeline work.

Justice Brennan's opinion in *Hicklin* likened the case to prior decisions which invalidated state discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the state. In that review he characterized *Toomer v. Witsell,* 334 U.S. 385 as "the leading modern exposition of the limitations the Clause places on a State's power to bias employment opportunities in favor of its own residents."

> " . . . (*Toomer*) invalidated a South Carolina statute that required nonresidents to pay a fee one hundred times greater than that paid by residents for a license to shrimp commercially in the three-mile maritime belt off the coast of that State. The Court reasoned that although the Privileges and Immunities Clause 'does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it,' *id.*, at 396, 68 S.Ct., at 1162, '[i]t does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States.' *Ibid.* A 'substantial reason for the discrimination' would not exist, the Court explained, 'unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed.' (*Id.*, at 398, 68 S.Ct., at 1163. Moreover, even 'where the presence or activity of nonresidents causes or exacerbates the problem the State seeks to remedy, there must be a reasonable relationship between the danger represented by non-citizens, as a class, and the . . . discrimination practiced upon them.' *Id.*, at 399, 68 S.Ct., at 1164. *Toomer's* analytical framework was confirmed in *Mullaney v. Anderson,* 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952), where it was applied to invalidate a scheme used by the Ter-

> ritory of Alaska for the licensing of commercial fishermen in territorial waters; under that scheme residents paid a license fee of only $5 while nonresidents were charged $50." (Hicklin, supra, at pp. 525-526.)

Appellant here invites us:

(1) to ignore the *Baldwin* test (i.e., is the nonresident seeking to engage in an essential activity or seeking to exercise a basic right?) as aberrational, as irrelevant or as of no precedential value given the clear standards reaffirmed in *Hicklin*, and,

(2) to apply the *Toomer-Hicklin* test (i.e., is there a substantial reason for the discrimination?).

In our view, that approach is itself a deviation from the proper course because it is premised on a reading of *Hicklin* as being at odds with its 30-day-older sibling, *Baldwin*. It is apparent to us that the two decisions by the Supreme Court are entirely consistent with each other and were intended to be. If a state distinguishes between its citizens and those of a sister state, the teaching of *Baldwin* is to first ask whether the activity at issue was essential or involved the exercise of a basic right. If the answer to that question is in the negative, as it was in *Baldwin* and is here, no further analysis is required. Neither noncommercial elk hunting nor receiving compensation as a crime victim from the state in which the crime occurred is a basic right. On the other hand, if the *Baldwin* question is answered affirmatively, as when the nonresident seeking to practice an occupation is discriminated against, then the *Toomer-Hicklin* three question analysis must be applied. Was there a substantial reason for the discrimination? Is

there something to indicate that noncitizens constitute a peculiar source of the evil at which the discriminating statute is aimed? Is there a reasonable relationship between the danger presented by noncitizens and the discrimination practiced upon them?

This synthesis of *Baldwin* and *Hicklin* is not spun from this Court of Appeal but is the pure product of the United States Supreme Court: we count four separate occasions in the terse, unanimous, *Hicklin* opinion in which the *Baldwin* decision is specifically referred to and relied upon. Nowhere in the *Hicklin* opinion do we find any explicit or implicit criticism of *Baldwin* or its rationale. Accordingly, we reject appellant's Privileges and Immunities Clause challenge.

II. *Equal Protection*

Appellant's second basis of constitutional attack is the Equal Protection Clause of the Fourteenth Amendment. He urges that the Victims of Crime statute is subject to strict judicial scrutiny because it invidiously discriminates between residents and nonresidents. Appellant points to no authority to support the theory that nonresidents should be afforded "suspect classification" treatment, nor are we able to find or create any.

As an alternative ground for invoking the strict scrutiny standard of review, appellant maintains that the Victims of Crime statute deprives him of his fundamental right to travel. Along this vein, he relies on several United States Supreme Court cases involving statutes drawn in question because of their *durational* residency requirements. (See, e.g., Shapiro v. Thompson (1969) 394 U.S. 618; Dunn v.

Blumstein (1972) 405 U.S. 330; Memorial Hospital v. Maricopa County (1974) 415 U.S. 250.) But here, unlike the situations involved in those cases, the residency requirement is not durational—that is, the migrant is not required to maintain the "resident" status for a certain period before he qualifies for benefits. (Ector v. City of Torrance (1973) 10 Cal.3d 129, 135-136.) Consequently, appellant's right to travel has not been infringed.[2]

Strict scrutiny being unnecessary and inappropriate, the residency requirement for the Victims of Crime statute must be upheld against an equal protection challenge if there is any rational relationship between the requirement and some legitimate state objective. The "Legislature is presumed to have acted constitutionally, and statutory classifications may be set aside only if no ground can be conceived to justify them, and they are wholly irrelevant to the achievement of the state's objective. (McDonald v. Board of Election (1969) 394 U.S. 802, 809; McGowan v. Maryland (1961) 366 U.S. 420, 425-426.)" (Adams v. Superior Court, supra, 12 Cal.3d 55, 62.) We find the residency requirement of the Victims of Crime statute to be rationally related to the state's legitimate objective of cost savings. (See, e.g., Baldwin, supra, at p. 391; Kirk v. Regents of University

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[2]When faced with the issue of whether a durational residency requirement for jurors impermissibly infringed upon an individual's right to travel, the California Supreme Court found "neither evidence nor reason to believe that one year's exclusion from jury duty is a factor materially affecting a person's decision to migrate, and any penalizing effect of the durational residency requirement is *inconsequential*. Thus, the requirement has *insufficient effect* on the right to travel to compel strict judicial scrutiny." (Adams v. Superior Court (1974) 12 Cal.3d 55, 62, emphasis added.)

Even if the residency requirement in the Victims of Crime statute would deter some individuals from visiting the state, we believe that the extent of any such deterence would be "inconsequential."

of California (1969) 273 Cal.App.3d 430, appeal dismissed 396 U.S. 554 (1970).)

III. *Other Grounds.*

The residency requirement does not operate as an impediment to travel and accordingly we reject appellant's claims under both the Privileges and Immunities Clause of the Fourteenth Amendment and the Interstate Commerce Clause. Any interference with appellant's freedom of movement is at most inconsequential. (See fn. 2, supra.)

Lastly, appellant presents a blanket argument that because "California has the independent authority and independent reasons for vigorously striking down irrational discrimination, irrespective of whether it also violates the Constitution of the United States" the Victims of Crime statute is unconstitutional under the California Constitution. Although we recognize that California may independently interpret its own Constitution (Serrano v. Priest (1976) 18 Cal.3d 728, 764) we are unconvinced that an independent interpretation would yield a contrary result in this case.

The judgment is affirmed.

Poché, J.

WE CONCUR:

Rattigan, Acting P.J.

Christian, J.

Order Due February 27, 1980

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 4, Civil No. 45277

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

[Filed Feb. 27, 1980]

Ostrager

v.

State Board of Control et al.

Manuel, J., did not participate.

Appellant's petition for hearing DENIED.

Newman, J., is of the opinion that the petition should be granted.

/s/ Bird

Chief Justice

In the Court of Appeal of the State of California
First Appellate District - Division Four

1 Civil 45277

(Sup. Ct. No. 734773)

[Filed May 16, 1980]

Bernard Ostrager,

Appellant,

vs.

State Board of Control, and the individual members thereof, Kenneth Cory, Ruth Church Gupta, David Janssen, in their official capacities as members of the State Board of Control,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Bernard Ostrager, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California, First Appellate District, Division Four, entered in this action on November 29, 1979, affirming the judgment denying peremptory writ of mandate and dismissing the complaint for declaratory

relief and relief under the Federal Civil Rights Act, entered in this action on May 16, 1978.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: May 16, 1980

MICHAEL TRAYNOR
COOLEY, GODWARD, CASTRO,
HUDDLESTON & TATUM

MARGARET C. CROSBY
ALAN L. SCHLOSSER
AMITAI SCHWARTZ
AMERICAN CIVIL LIBERTIES
UNION OF NORTHERN
CALIFORNIA, INC.

By MICHAEL TRAYNOR
Attorneys for Appellant

Supreme Court, U. S.
FILED
JUL 24 1980
MICHAEL RODAK, JR., CLERK

No. 79-1865

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

BERNARD OSTRAGER,
Appellant,
VS.
STATE BOARD OF CONTROL, et al.,
Appellees.

On Appeal from the Court of Appeal of the State of California, First Appellate District Division Four

MOTION OF APPELLEES TO DISMISS OR AFFIRM

GEORGE DEUKMEJIAN
Attorney General of the
State of California
IVER E. SKJEIE
Deputy Attorney General and
Counsel of Record
6000 State Building
350 McAllister Street
San Francisco, CA 94102
Telephone (415) 557-4033
Counsel for Appellees

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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No. 79-1865

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

BERNARD OSTRAGER,
Appellant,
VS.
STATE BOARD OF CONTROL, et al.,
Appellees.

On Appeal from the Court of Appeal of the State of California, First Appellate District Division Four

MOTION OF APPELLEES TO DISMISS OR AFFIRM

Appellees State Board of Control of the State of California and the individual members thereof, Kenneth Cory, Ruth Church Gupta and David Janssen, in their official capacities, pursuant to Rule 16.1 subsections (b) and (d) of the Rules of the Supreme Court respectfully move to dismiss this appeal or affirm the decision of the Court of Appeal of the State of California (First Appellate District, Division Four) which affirmed a trial court judgment in favor of appellees. Appellees submit that this appeal presents no substantial federal question as warrants further argument or consideration.

Opinion Below, Jurisdiction and Statute Involved

Appellant's Jurisdictional Statement of May 21, 1980 accurately identifies the action of the California courts from which this appeal is taken, the jurisdiction of this Court, and the California Statute in issue, California Government Code section 13961(a).[1]

Questions Presented

1. Under the Privileges and Immunities Clause of Article IV of the Constitution of the United States, may California limit the benefits conferred by its victims of crimes act to persons who were or are at the time of their injury "residents of California"?

2. Is California's limitation of benefits under its victims of crime act to those who are or were ". . . residents of California at the time the crime was committed . . ." repugnant to the Equal Protection or Privileges or Immunities clauses of the Fourteenth Amendment to the Constitution of the United States or to the Commerce Clause thereof?

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[1]California Government Code section 13961(a) provides:

"(a) A victim of a crime of violence may file an application for assistance with the board provided that the victim was a resident of California at the time the crime was committed and either:

(1) The crime was committed in California; or

(2) The person whose injury or death gave rise to the application was a resident of California who was injured or killed while temporarily outside the state."

STATEMENT OF THE CASE

A. Nature of the Action

The California Victims of Crime Act, Government Code sections 13959 through 13969.1, provides limited benefits to a limited category of victims of violent crimes. The victim of violent crimes program is administered by appellee State Board of Control. Pursuant to the act, the Board will not accept applications from victims who were not residents of California at the time they were injured. The Board of Control and its members are the appellees in this action in which appellant challenges the constitutionality of the non-durational residency limitation and the action of the Board of Control based thereon.

B. Summary of Facts

Appellant, a citizen and resident of the State of New York, was shot in the leg while vacationing in California. He was hospitalized for medical treatment in San Francisco and then returned home to New York. He filed an application for benefits under California's Victims of Crime statute. Appellee Board of Control refused to accept the application because appellant was not, and did not claim to have been, a resident of California at the time the crime was committed.

C. Summary of Proceedings In The Trial Court and Relief Sought

Following appellee Board's refusal to accept appellant's application, appellant filed a petition for writ of mandate and for declaratory and other relief in the Superior Court for the City and County of San Francisco. He sought a

declaration that the non-durational residency limitation in the Victims of Crime Act is unconstitutional and an order directing appellee Board of Control to entertain his application in spite of the fact that he was not and did not claim to have been a resident of California at the time the crime was committed. An alternative writ issued. Appellees demurred generally to the Petition. The trial court heard the case on stipulated facts, briefs and oral argument. The trial court sustained appellees' demurrer without leave to amend, discharged the alternative writ, denied a peremptory writ and dismissed appellant's complaint for declaratory relief, for relief under the Federal Civil Rights Act of 1871, and for declaratory relief. Judgment was entered for appellees and appellant appealed.

D. Summary of Proceedings In And Decision of Court of Appeal

By decision filed November 29, 1979, (Appendix A to Appellant's Jurisdictional Statement herein), the Court of Appeal affirmed the trial court's judgment. The trial court action affirmed was predicated upon the fact that at the time petitioner became a victim of violent crime, he was a citizen of the United States and a citizen and resident of New York but not a resident of California and so not entitled to relief under the California Victims of Crime statute which constitutionally limited relief thereunder to California residents.

The decision of the Court of Appeal accurately describes the proceeding brought by appellant and the trial court's action (Decision, Pp. 1-2). The Court of Appeal reviewed the Victims of Crime statute, considered appellant's con-

tentions of constitutional invalidity that the statute denied to appellant privileges and immunities and equal protection, violated the commerce clause, and that the statute is unconstitutional under the California Constitution. Finding no constitutional invalidity, the Court of Appeal affirmed the trial court's judgment.

Appellant's petition for hearing by the Supreme Court of California was thereafter denied February 12, 1980 as indicated by Appendix B to appellant's Jurisdictional Statement.

E. The California Victims of Crime Act

The California Victims of Crime Act is found in California Government Code sections 13959-13969.1. The act created and provides for a program of limited and restricted benefits and relief only. One of the limitations placed by the Legislature on the scope of the program is that to apply for benefits, the victim must have been "a resident of California at the time the crime was committed." (Government Code § 13961(a)); the residency limitation imposed includes no duration or minimum time of residency requirement.[2]

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[2]Other limitations on the scope of the program are created by restricting benefits to "innocent" (Section 139.46(a) & (b)) "victims", who are defined in narrow terms (Section 13960(a)), of crimes of violence only (Section 13960(b)) who suffer pecuniary loss, meaning medical expense, loss of income or support, which is not indemnified from other sources, equals more than $100 or 20% of the victim's net monthly income (Section 13960(d)) and is not recoupable by the victim without suffering serious financial hardship (Section 13959). The statute specifically limits amounts payable to not to exceed $10,000 in medical expense, $10,000 in loss of wages or support, and $3,000 in job retraining or rehabilitation expenses (Section 13965).

California's Victims of Crime Act is and was, for the United States, a statute of first impression, passed initially in 1965; England and New Zealand had previously passed victims of crimes compensation statutes. (Aid to Victims of Violent Crimes In California, Shank, Willard (1970) 43 So. Cal. L.R. 85). The enactment by California was an experiment for, and by it, California attempted to meet, in part, a previously felt need or obligation to provide needed compensatory relief to victims of violent crimes. Consistent with well established precèdent, California did not attempt to resolve or cure the entire problem; to the contrary, it sought simply to ameliorate the loss suffered by victims of crime. Partial alleviation or amelioration, as distinguished from total solution, is an appropriate legislative objective, as repeatedly indicated by pronouncements of this Court. In *Katzenbach v. Morgan*, 384 U.S. 641 (1965), the Court stated at page 657:

> " . . . in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' . . . that a legislature need not 'strike at all evils at the same time,' . . ., and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' " (Citations omitted).

In 1976 as to a limitation of those who might operate push-carts in the French Quarter of New Orleans to those who had done so of long standing, the Court stated in *New Orleans v. Dukes*, 427 U.S. 297 (1976) at pages 303-304:

> "Legislatures may implement their program step by step . . . In short, the judiciary may not sit as a super-

> legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . ., in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment . . ."

Respondents submit such is equally applicable here and that the California Victims of Crime Act is not to be held invalid because it sought to protect the public fisc by limiting the breadth and scope of the program, by among other restrictions, limiting those eligible for receipt of benefits to persons who were residents of California at the time they were criminally victimized.

The Questions Posed Present No Substantial Federal Question

1. There is precedent for this Court's dismissal and affirmance of appeals contesting the validity of statutes which discriminate on the basis of residency for want of a substantial federal question

This Court has regularly dismissed or affirmed appeals from decisions sustaining the validity of statutes which denied State benefits on grounds of lack of required residency. In *Kirk v. Board of Regents* (1969) 273 Cal.App.2d 430, petition for hearing by California Supreme Court denied August 13, 1969, this Court granted a motion to dismiss for want of a substantial federal question (*Kirk v. Board of Regents* (1970) 396 U.S. 554). The California Court of Appeals decision in *Kirk* held that a nonresident's fundamental right to travel was not infringed

by not merely a residency requirement but a durational residency requirement of one year as a condition to no or substantially reduced tuition or fees to attend the State University. In a similar tuition case originating in Minnesota, this Court affirmed a similar residency requirement (*Starns v. Malkerson*, 326 F.Supp. 234 (D. Minn. 1970), aff'd mem. 401 U.S. 985 (1971)). As to a non-durational residency requirement, this Court dismissed for want of a substantial federal question an appeal from a decision upholding the total exclusion from a state of non-resident hunters of migratory waterfront (*State v. Kemp* (1950) 73 S.D. 458, 44 NW 2d 214, appeal dismissed (1951) 340 U.S. 923).

For the reasons set forth below, appellees submit the instant appeal is wanting as to any substantial federal question and that thus this appeal should be summarily dismissed or the decision appealed from affirmed.

2. The non-durational residency requirement included in California's victims of crime statute does not violate the Privileges and Immunities Clause of Article IV Section 2(1)

The privileges and immunities clause of Article IV Section 2(1) is not a provision the scope and meaning of which has been thoroughly defined by multiple litigation and judicial interpretation over its two hundred year life span (*Baldwin v. Montana Fish & Game Comsn.*, 436 U.S. 371, 379-380 (1978) hereafter sometimes referred to as *"Baldwin"*). The clause was designed to afford the citizens of one state who visited another the basic rights of citizens of the visited state (*Paul v. Virginia*, 8 Wall 168, 180

(1869); *Baldwin, supra,* 382) to the end that there might be formed and maintained a single nation (*Austin v. New Hampshire,* 420 U.S. 656, 660-661 (1975); *Baldwin, supra,* 382-383). To such end, Article IV Section 2(1) has been applied to invalidate unreasonable burdens imposed on citizens of other states in pursuing common callings within a visited state (*Ward v. Maryland,* 12 Wall 418 (1871); *Hicklin v. Orbeck,* 437 U.S. 518 (1978); *Mullaney v. Anderson,* 342 U.S. 415 (1952)), on ownership and disposition of property privately held within a State (*Blake v. McClung,* 172 U.S. 239 (1898), and in seeking access to the courts of a visited State (*Canadian Northern R Co. v. Eggen,* 252 U.S. 553 (1920)). Conversely, as noted in *Baldwin* at pages 383-384:

> "It has not been suggested, however, that state citizenship or residency may never be used by a State to distinguish among persons. Suffrage, for example, always has been understood to be tied to an individual's identification with a particular State. See, e.g., *Dunn v. Blumstein,* 405 U.S. 330 (1972). No one would suggest that the Privileges and Immunities Clause requires a State to open its polls to a person who declines to assert that the State is the only one where he claims a right to vote. The same is true as to qualification for an elective office of the State. *Kanapaux v. Ellisor,* 419 U.S. 891 (1974); *Chimento v. Stark,* 353 F.Supp. 1211 (NH), summarily aff'd, 414 U.S. 802 (1973). Nor must a State always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do. *Canadian Northern R. Co. v. Eggen, supra;* cf. *Sosna v. Iowa,* 419 U.S. 393 (1975); *Shapiro v. Thompson,* 394 U.S. 618 (1969). Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States,

> and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and non-resident, equally. Here we must decide into which category falls a distinction with respect to access to recreational big-game hunting."

While a State is not precluded by the Privileges and Immunities Clause from discriminating on the basis of residency alone, its power so to do is limited when such exercise significantly affects exercise of basic constitutional rights as for example the right to engage in interstate commerce, the right to pursue a livelihood, or the implementation of federal powers (*Baldwin, supra,* pages 385-386; *Hicklin, supra; Toomer v. Witsell,* 334 U.S. 385 (1948). In *Baldwin* at page 387 the Court summarized the force of the clause:

> "With respect to such basic and essential activities (pursuit of common callings, ability to transfer property, access to the courts), interference with which would frustrate the purposes of the formation of the Union, the States must treat residents and non-residents without unnecessary distinotions." (material in parenthesis added.)

The two basic standards for testing the validity under Article IV Section 2(1) of state classifications which discriminate against non-residents have been (1) whether there was a substantial reason for the discrimination beyond the mere fact of residency in another State and (2) as to licensing and regulatory measures, whether there

is something whereby non-residents constitute a peculiar source of evil or problem at which the discriminatory statute is aimed (*Toomer v. Witsell,* 334 U.S. 385, 398 (1948). The latter standard, a peculiar evil associated with non-residents, is not apposite to the instant appeal for California's victims of crimes act is not a licensing or regulatory statute and is not designed to deal with an evil created by non-resident visitors. Thus the standard applicable is simply that California must have had a substantial reason to distinguish between residents and non-residents. As in this Court's recent Baldwin decision, California has such a substantial reason.

California's victims of violent crime statute is a statute of first impression. It created a program of first impression, the fiscal effects of which are yet being ascertained. The program is financed entirely with State funds. The California Legislature in providing for such an experiment knew it was entering upon a program the costs of which could not be approximated with any degree of accuracy. The statute enacted is itself eloquent evidence of the Legislature's evident attempt and intent to ameliorate a felt need and at the same time limit the cost of the program by limiting the scope of monetary benefits granted as well as the burdens incident to administration of an intra as compared to an inter state program. And the Legislature's limitation of the program on the basis of residency did and does not infringe on the right such a discrimination normally violates, the right to travel or migrate. This is so for the statute imposes no duration or time requirement whatever on the residency which is required.

In light of the very limited residency restriction imposed, in light of the right appellant was exercising—to enter and remain temporarily in California for purposes of a vacation—the same right being exercised in *Baldwin,* and in light of California's determined need to limit the scope of the obligations created by its victims of crime act so as to protect California's fisc, appellees submit there was and is substantial reason for and that the simple non-durational residency requirement imposed clearly does not violate the privileges and immunities clause of Article IV Section 2(1).

3. The non-durational residency limitation included in California's victim of crime statute does not violate Fourteenth Amendment Protections

Unlike the privileges and immunities clause of Article IV Section 2(1), the Fourteenth Amendment has frequently been the basis of attack on residency requirements imposed by State enactments. Appellant herein argues, in substance, that the non-durational residency limitation imposed in California's victims of crime act is like Constitutional defects which violate fundamental rights through discriminations based on durational residency requirements. Appellees submit that under clear and current decisions of this Court, such argument is not in point and that appellant's Fourteenth Amendment appeal presents no substantial federal questions.

It should first be remembered that even durational residency requirements are not always violations of the Fourteenth Amendment equal protection clause. (*Sosna v. Iowa,* 419 U.S. 393, 406 (1975)). While durational residency limi-

tations which affect fundamental rights must, to be valid, be the offspring of and serve compelling state needs or interests (*Shapiro v. Thompson,* 394 U.S. 618 (1969) (welfare benefits required to meet bare necessities); *Dunn v. Blumstein,* 405 U.S. 330 (1972) (voting registration); *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974) (free non-emergency medical care), non-fundamental rights may be conditioned on either durational or non-durational residency requirements. (*Starns v. Malkerson,* 326 F. Supp. 234 (D. Minn. 1970) aff'd 401 U.S. 985 (1971) and *Kirk v. Board of Regents,* 273 Cal.App.2d 430 (1969), dismissed for want of substantial federal question (*Kirk v. Board of Regents,* 396 U.S. 554 (1970) (durational residency requirement for lower tuition); *Sosna v. Iowa,* 419 U.S. 393 (1975) (durational residency for divorce)).

As to non-durational residency requirements and especially those which do not affect fundamental rights, such do not violate the Fourteenth Amendment. In *Shapiro v. Thompson,* 394 U.S. 618 (1969) at page 633 this Court as to the validity of residency requirements stated:

> "We recognize that a State has a valid interest in preserving the fiscal integrity of its programs."

This Court in 1978 had occasion to consider the validity under the Fourteenth Amendment equal protection clause of a statutory scheme which discriminated on a non-durational basis between resident hunters and non-resident vacationing sportsmen. In the *Baldwin* case at page 391, after finding the State's efforts were rational and not invidious, the Court stated as to significant licensing differentials:

> "We perceive no duty on the State to have its licensing structure parallel or identical for both residents and

> non-residents, or to justify to the penny any cost differential it imposes in a purely recreational, non-commercial, non-livelihood setting. Rationality is sufficient."

As noted in Section 2 above, the residency limitation involved in the instant appeal is a non-durational one. The statute with which it deals affects no right yet declared fundamental; the right to be compensated by a State for injuries suffered as a result of criminal conduct would hardly seem to rise to the level of a right to a free, as opposed to a tuition conditioned, education, which right or differential this Court has at least twice held may be made dependent on a durational residency requirement (*Kirk v. Board of Regents,* 273 Cal.App.2d 430 (1969), motion to dismiss for lack of substantial federal question granted 396 U.S. 554 (1970); *Starns v. Malkerson,* 326 F.Supp. 234 (D. Minn. 1970), aff'd mem. 401 U.S. 985 (1971)).

As in the *Baldwin* case, appellant entered and was in California not as a migrant thereto, not to pursue his livelihood therein, not to make it his home or to acquire property there or to enlist the aid of its courts. As in *Baldwin,* appellant simply temporarily traveled from the State of his continued residency for a temporary stay, a vacation, in California. As a simple matter of happenstance and not as a to be anticipated incident of his vacation, he fell victim to a crime. The differentiation made by California's statute is clearly not irrational. Such was designed to limit the State's financial exposure by limiting the group eligible to receive benefits and by easing the administration of the program by basically making the same one which need only be administered on an intrastate

basis. Such being the case, appellees submit the instant appeal raises no substantial federal equal protection questions.

As to the privileges or immunities of citizens of the United States clause of the Fourteenth Amendment, appellees know of no authority which indicates such imposes additional or more stringent limitations than are imposed by the equal protection clause.

4. The non-durational residency limitation does not violate the Commerce Clause

California's non-durational residency requirement does not, as appellant contends, violate the Commerce Clause. This Court's most recent pronouncement on residency and the Commerce Clause, *Reeves Inc. v. Stake* No. 79-677 decided June 19, 1980, holds that a State which prefers its residents over prospective non-resident purchasers in sale of a commodity manufactured by the State does not violate the Commerce Clause, Article I Section 8 cl. 3. In so concluding, the Court, after differentiating between a State acting as a proprietor-market-participant and as a market regulator, explained the object of the Clause:

> " . . . the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national market."

California's victims of crime statute, including its limitation of benefits to residents, has little if any connection with regulation of private trade and imposes no apparent effects on taxes on anyone or on any business transactions.

The instant case does not appear to present any but the most tangential of commerce clause questions. California

is not acting as a direct or indirect market participant. It appears clear that it is not attempting to tax, let alone tax so as to affect interstate commerce. It similarly would appear that in implementing its victims of crime statutes, California is not attempting to regulate commerce. And appellees know of no authority which would apply the Commerce Clause to this type of State action or which imposes additional or more stringent limitations than are imposed by the equal protection clause. Accordingly appellant raises no substantial federal question under the Commerce Clause.

CONCLUSION

None of the grounds advanced by appellant in his Jurisdictional Statement present any substantial federal question. To the contrary, appellant in substance repeats what he did in the California Court of Appeal; he in effect asks this Court to ignore its recent and in point decision in *Baldwin v. Montana Fish and Game Comsn.*, 436 U.S. 371 (1978), to treat such as an irrelevant aberration of no precedential value, and to exclusively apply the stricter *Hicklin v. Orbeck*, 437 U.S. 518 (1978) test, notwithstanding significant factual differences and the fact this Court decided *Hicklin* within a month of *Baldwin* and in its decision cited its reasoning in *Baldwin* with approval.

California's statute is an experiment and attempt to alleviate or ameliorate one of society's ills in California, the havoc wrought to victims by criminal conduct. Resources developed largely in California are the foundation of the program. The benefits of the program are available to all who are residents of California, as soon as and as

long as they are residents. The residency limitation has no durational component. It seems clear that California's interest in limiting the exposure of its fisc to expenditure, both by benefits paid and by cost of administration of an intra as compared to an interstate program are a perfectly rational basis for the minimal discrimination imposed. It further appears that such limitation would likely have little, if any effect whatever, on a non-resident's decision to vacation or not vacation in California. Accordingly, appellees respectfully submit this appeal presents no substantial federal question and that thus their motion to affirm or dismiss should be granted.

Dated: July 23, 1980

Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General of the
State of California
IVER E. SKJEIE
Deputy Attorney General and
Counsel of Record
Counsel for Appellees